

April 14, 2008

Mark Holsten
Commissioner
Minnesota Department of Natural Resources
500 Lafayette Road
St. Paul, MN 55155-4040

Re: *In the Matter of the Appeal of the Trespass Citation Issued to Billy Joe Finke, Citation No. 31965;*
OAH Docket No. 3-2000-19551-2

Dear Commissioner Holsten:

The undersigned Administrative Law Judge (ALJ) conducted a telephone prehearing conference in this case on Thursday, April 3, 2008. The ALJ, Deputy Paul Burke of the Wright County Sheriff's Office, and the Respondent Billy Joe Finke participated. During the course of the telephone conference, the ALJ determined that the testimony of the complaining witness, Scott Carlen, was material and necessary to resolution of this matter. The ALJ therefore set this matter for a subsequent telephone hearing to give Mr. Carlen an opportunity to present his testimony, as well as to take testimony from Deputy Burke and Mr. Finke. The ALJ convened that telephone hearing at 1:30 p.m. on April 8, 2008. Deputy Burke, Mr. Finke, and Mr. Carlen all testified under oath. The OAH hearing record closed when the telephone hearing ended.

The following facts are undisputed facts: On December 18, 2007, at approximately 4:45 p.m., Mr. Finke was driving his pickup truck, Minnesota License No. UJD 637, northbound on Quinnell Avenue SW, Cokato, Minnesota. He saw a rooster pheasant either on or near the road right-of-way, drove past the bird, and slowed down to a stop. Thereafter, Mr. Finke got out of his truck with a shotgun and started walking toward the bird. He fired two shots at the pheasant and either wounded or killed it. At some point, either before or after the shots were fired, Mr. Finke and his dog entered an agricultural field adjacent to the east side of Quinnell Avenue that was owned by Mr. Carlen. Both Mr. Finke and his dog left footprints in the field. Mr. Carlen had been in his farm office, which was located on property on the west side of Quinnell Avenue and south of where Mr. Finke had parked his pickup truck. At some point, Mr. Carlen had noticed Mr. Finke's presence on or near Quinnell Avenue. He got into his truck,

drove northward on Quinnel Avenue, parked near Mr. Finke's pickup truck, and approached Mr. Finke as he and his dog were coming out of the field. Mr. Carlen asked Mr. Finke, "What the hell do you think you're doing." Mr. Finke replied, "I'm pheasant hunting." Mr. Carlen then pointed out to Mr. Finke that the field was posted with signs indicating "No trespassing," to which Mr. Finke responded, "You're allowed to shoot in the road." After Mr. Carlen stated that he would be calling the sheriff, Mr. Finke got back into his pickup truck and drove away. Before he left, Mr. Carlen wrote down the number on the truck's license plate.

Mr. Carlen called the Wright County Sheriff's office at approximately 4:45 p.m. on December 18, 2007, and approximately two hours later Deputy Burke drove out to Mr. Carlen's farm and took his statement. Mr. Carlen also showed Deputy Burke footprints and dog tracks extending eastward from Quinnel Avenue into Mr. Carlen's field. Deputy Burke did not examine the right-of-way on the west side of Quinnel Avenue, nor did he notice any empty shotgun shell casings on either side of the right-of-way or in the field. After leaving Mr. Carlen's farm, Deputy Burke ran a check on the license number and determined that the truck was registered to Mr. Finke. The next day, Deputy Burke obtained a statement from Mr. Finke about what had occurred on December 18th. Mr. Finke admitted that he had been pheasant hunting in the vicinity of Mr. Carlen's property during the previous day. He stated that he had, in fact, stopped his pickup truck on Quinnel Avenue near Mr. Carlen's property and had shot a pheasant there. But Mr. Finke stated that the bird had been on the road right-of-way when he shot it, but that he had failed to kill the bird, and that it had run into Mr. Carlen's field. Mr. Finke stated that his dog went into the field to retrieve the pheasant but had trouble retrieving it because the bird was still alive. He stated that it was only then that he entered Mr. Carlen's field in order to retrieve the bird and his dog.

There are, however, material facts that were in dispute. Although the testimony both Mr. Carlen and Mr. Finke gave at the hearing essentially repeated the statements they had given to Deputy Burke, both added some relevant details. Mr. Carlen was emphatic that Mr. Finke had been in the field when he shot the pheasant. Although he testified that his view of Mr. Finke had been partially obscured by trees on the property, he had heard shots fired while Mr. Finke was clearly in the field. Mr. Carlen also testified that Mr. Finke was armed with a breach loading shotgun when Mr. Carlen encountered him walking out of the field. Both the testimony and the existence of dog tracks in the field establish that Mr. Finke was accompanied by his dog when he was coming out of the field. Mr. Finke, on the other hand, was equally emphatic in testifying that he had initially shot the bird when it was on the west side of the Quinnel Avenue right-of-way, and that the pheasant, which was still alive, had then run across the road to the east side and into Mr. Carlen's field. Mr. Finke further testified that he had then placed his shotgun back into his pickup truck and had walked unarmed into Mr. Carlen's field to retrieve both his dog and the bird. Mr. Finke also testified that he does not own a breach loading shotgun but only owns a pump action shotgun that ejects shell

casings. Mr. Finke stated that if Deputy Burke had inspected the west side of the road right-of-way, he would have found shell casings, which would have tended to corroborate his own version of events.

Minn. Stat. § 97B.001, subd. 2, provides that a person may not enter posted agricultural land for outdoor recreation purposes without first obtaining permission of the owner, occupant, or lessee. The statute further prohibits a person from taking a wild animal on any land where the person is prohibited from entering. See Minn. Stat. § 97B.001, subd. 7. However, Minn. Stat. § 97B.001, subd., contains an exception to that general rule that allows a person to enter even posted land without the owner's permission to retrieve a hunting dog so long as that person is not carrying a firearm while on the property. Thus, the citation should be affirmed here either if Mr. Finke was on Mr. Carlen's property when he shot the pheasant or if he was armed when he admittedly entered the property to retrieve his dog.

Mr. Carlen's and Mr. Finke's versions of events contain two irreconcilable contradictions about material facts—that is, whether Mr. Finke was in Mr. Carlen's field when he shot the bird and whether he was armed while he was admittedly in that field. There were no other witnesses to what occurred, and there is no physical evidence that tends to support one version over the other. Minn. R. 1400.8608 provides:

The party with the burden of proof shall have the burden of supporting its proposed action by a preponderance of the evidence. If another party asserts any affirmative defenses, that party shall have the burden of proving the defense by a preponderance of the evidence.

"Preponderance of the evidence" means that the evidence establishes that it was more probable that something occurred than that it did not occur. An illustration frequently used by courts when instructing juries is that if scales weighing the evidence were to tip one way or the other, a preponderance has been established. In this case, in order to support the citation, a preponderance of the evidence must establish that Mr. Finke shot the pheasant while either he or the pheasant was in Mr. Carlen's field. Alternatively, if he did shoot the pheasant outside of the field and the wounded bird ran into it, a preponderance of the evidence must establish that Mr. Finke was armed while he was in the field retrieving his hunting dog. Here, there is no evidence in the record tending to tip the scales in favor of the contradictory testimony of either Mr. Carlen or Mr. Finke. The burden of proof is therefore not met in this case, and the ALJ recommends that the Commissioner DISMISS Citation No. 31965 that was issued to Billy Joe Finke on December 22, 2007.

Pursuant to Minn. Stat. § 116.072, subd. 6(e), the Commissioner must wait at least five days after receipt of this recommendation before making a final decision. Within those five days, the person to whom the order is issued may comment on this recommendation. The Commissioner must send a copy of the final decision to

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Mr. Finke. If the Commissioner fails to act within 90 days after the record closes, this recommendation will become the final decision in this matter.

Dated: April 14, 2008

s/Bruce H. Johnson

BRUCE H. JOHNSON

Assistant Chief Administrative Law Judge

Enclosure

cc: Deputy Paul Burke
Billy Joe Finke